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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SBC COMMUNICATIONS, INC. et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE STATE OF TEXAS

Pursuant to Supreme Court Rule 37.4, the Attorney General of the State of Texas submits this amicus curiae brief on behalf of the State of Texas ("Texas").

Competition in the telecommunications industry, its benefits to consumers, and, consequently, the Fifth Circuit's decision, all have

critical implications to the State of Texas. Texas plays a key role in the development of competitive markets for telecommunications services in the State. The Telecommunications Act itself, in Sections 251 through 253, entrusts to the States critical regulatory responsibility for opening these markets. More generally, Texas, primarily through its Attorney General, is the principal enforcer of state and federal antitrust laws at the State level. As the principal law enforcement authority in the areas of antitrust and consumer protection, Texas has a compelling interest in ensuring that its citizens, as consumers, reap the significant benefits offered by open competition in the telecommunications marketplace.

The central legal question presented by the petition for certiorari is whether Sections 271 through 275 of the Telecommunications Act, the "Special Provisions," violate the Constitution's prohibition against bills of attainder. Texas believes that the Special Provisions - far from furthering competition or helping consumers - undermine competition and seriously harm Texas citizens. For these reasons, Amicus State of Texas urges the Court to grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This brief does not address the constitutional issues raised by Petitioners; Texas concurs in Petitioners' constitutional arguments. Instead, Texas submits this amicus brief to make three additional points. First, the Texas Public Utility Commission ("PUC") expends substantial resources in fulfilling its consultative responsibilities under section 271. Texas has a significant interest in having the constitutionality of the Special Provisions resolved before it makes further, potentially unnecessary, expenditures.

Second, the Special Provisions harm Texas consumers and the Texas economy. Empirical evidence shows that where local telephone companies have been allowed to provide long-distance service, customers have received not only the convenience of

"one-stop shopping," but also substantial reduction in long-distance rates.

Third, the Special Provisions are not necessary to protect local competition. Well before the United States Congress passed the Telecommunications Act of 1996, Texas had enacted legislation opening Texas telecommunications markets to competition. Adequate regulatory safeguards - both at the state and federal level - are in place to promote open and fair competition. Unlike the Special Provisions, these safeguards apply even-handedly to all local telephone companies and protect consumers of all types - residential, commercial, rural, and urban.

ARGUMENT

I. TEXAS HAS A SUBSTANTIAL INTEREST IN HAVING THE CONSTITUTIONALITY OF THE SPECIAL PROVISIONS RESOLVED.

The States have a significant stake in this case. Section 271's requirement that the Federal Communications Commission ("FCC") "consult" with the States in determining whether a particular Bell Operating Carrier ("BOC") has satisfied all of that section's requirements has become a significant undertaking for State public utility commissions throughout the country.

In Texas, the PUC has overseen nine months of hearings before four separate Administrative Law Judges, including a week-long hearing before the Commissioners themselves. Parties have submitted thousands of pages of briefs and other supporting material. After identifying 129 separate issues that are in dispute, the PUC launched a "collaborative process" through which it intends to resolve them.[1] The PUC has established separate

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[1]Commission recommendation, Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications

dockets to investigate SBC's compliance with particular items on the competitive checklist. *See* 47 U.S.C. § 271(c)(2)(B). In short, section 271 has already required a massive undertaking in Texas, and the substantial uncertainty surrounding the constitutionality of the Special Provisions is a serious concern. This Court should grant the petition to resolve this uncertainty and put an end to this potentially needless expenditure of resources.

Texas is not alone. Section 271 proceedings are currently pending in nearly every State, and those proceedings have generally been elaborate – often involving the submission of thousands of pages of prepared testimony, lengthy, formal oral hearings, multiple rounds of briefings, and the participation of numerous private parties, including long-distance incumbents who have a strong incentive to raise every potential argument in order to prevent or at least delay long-distance entry by the BOCs. Given the significant resources that they are currently expending in this process, States have a strong interest in obtaining a prompt, definitive resolution of the constitutional questions surrounding the Special Provisions.

II. THE SPECIAL PROVISIONS HARM BOTH COMPETITION AND CONSUMERS.

A. The Special Provisions Harm Competition and Consumers Generally.

Experience has shown that consumers are not served well by artificial barriers to entry. Instead, open competition, constrained only by requirements of nondiscrimination and interconnection, provides consumers with the best opportunities and value. That is precisely the approach Texas has taken to the telecommunications market in the State. The Special Provisions' restrictions are not needed to cause the BOCs to meet their legal

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Market, PUC Project No. 16251 (PUC June 1, 1998).

obligations. Texas - in conjunction with the FCC, other States, and private parties - is fully capable of - and fully committed to - protecting new entrants and preventing anti-competitive conduct by any incumbent telephone company or any other company. The Special Provisions do nothing more than protect the unrestricted companies from competition and, more importantly, deny citizens a fully competitive telecommunications market.

When incumbent local telephone companies have been allowed to participate in the types of markets from which the Special Provisions now preclude the BOCs, consumers have received substantial benefits without harm to competition. Two examples clearly demonstrate this:

1. Long-Distance Service by SNET and GTE. Although the Telecommunications Act prohibits the BOCs from entering long-distance markets in the regions where they are local exchange carriers, it does not prohibit other incumbent local exchange carriers, such as Southern New England Telephone Company ("SNET") and GTE Corporation ("GTE"), from offering such services or from packaging their local and long-distance services together. Therefore, non-BOC local exchange carriers can provide convenient one-stop shopping to their customers. Importantly, SNET and GTE have made significant competitive gains through aggressive price competition that has directly benefited consumers. Professor Jerry Hausman has estimated that SNET's overall rates are 18% lower on average than AT&T's overall rates (including AT&T's discount plans) and that GTE's rates average 17% lower.[2] Moreover, other long-distance carriers, AT&T and MCI, have responded to this price competition in Connecticut by seeking to lower their rates in that State.

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[2] Declaration of Professor Jerry A. Hausman at 6,8, attached to Reply Comments of BellSouth Corporation in Support of Ameritech Michigan's Application for Provision of In-Region, InterLATA Services, Application of Ameritech Michigan, CC Docket No. 97-137 (FCC filed July 7, 1997).

2. Long-Distance Service in the New Jersey Corridor. When NYNEX and Bell Atlantic were allowed to provide inter local access and transport area (or interLATA) service to in-region customers in two geographic corridors running from New York City and Philadelphia into New Jersey, the local carriers likewise set their prices well below those of the major carriers. In fact, according to AT&T's own figures, Bell Atlantic's corridor rates are as much as one-third lower than AT&T's.[3] As a result, AT&T petitioned the FCC for authority to reduce its long-distance rates for New Jersey customers in these corridors. MCI shortly followed suit, petitioning the FCC "so that [MCI] likewise [would] be in a position to *benefit consumers* by being able to complete effectively against Bell Atlantic and AT&T."[4] In their petitions, both AT&T and MCI frankly admitted that consumers in these corridors are better off than consumers who cannot obtain long-distance service from an incumbent BOC.[5]

Experiences like these make clear that consumers and local economies benefit when competition is truly open. Just as clearly, these experiences reflect that consumers and economies in Texas are being harmed by the Special Provisions. Without the Special Provisions, Texas consumers will be able to share in the lower

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[3] AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26, Attachment A (FCC filed Oct. 23, 1996,) ("AT&T Waiver Petition").

[4] MCI Comments, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26 at 1 (FCC filed Nov. 18, 1996)(emphasis added).

[5] See AT&T Waiver Petition at 5 (consumers in the corridors, unlike other areas, "benefit from the highest degree of competition possible"); MCI Comments at 3 ("fully support[ing]" AT&T arguments).

prices and increased innovation that competition brings.[6]

B. The Special Provisions Disproportionately Harm Rural Consumers.

Although the Special Provisions impact most consumers, their effects are particularly harmful to rural communities. By definition, rural consumers live in less densely populated areas and are often in isolated locations that are harder and less profitable to service. Texas believes that removing the restrictions on providing long-distance service, for example, would directly benefit rural citizens with lower long-distance rates, greater selection, and new innovations in the long-distance market. Moreover, removing the long-distance restriction should also prompt long distance carriers to begin to provide competing *local* phone service in rural communities.

As discussed above, one of the principal advantages enjoyed by the long distance companies and other non-BOC local exchange companies is that they can offer their customers one-stop shopping for all of their telecommunication needs. BOCs, solely by virtue of the Special Provisions, cannot offer their customers this advantage. Yet, BOCs are among the most active local exchange carriers in the rural markets. If the BOCs are allowed to provide long-distance service, rural businesses and consumers can expect to see competitors vying for their business (instead of ignoring them, as they are now). Rural consumers deserve the choice that comes from letting all providers offer a full range of services.

Removing the Special Provisions would also likely have a

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[6]A study by the WEPA Group estimates that if the BOCs were permitted into the long distance market, rates in that market would drop by 25% over five years. *See* The WEPA Group, The Economic Impact of Southwestern Bell's Entry into the InterLATA Long Distance Markets in Oklahoma at 18 (Feb. 1998).

beneficial effect on competition in rural local markets. Few, if any, new carriers are offering local service to rural communities, despite the incentives created by the Telecommunications Act. As AT&T has admitted, companies will start to provide local service only "where and when it makes economic sense."[7] Unfortunately, thinly populated rural areas are the most expensive to serve, which means, as the FCC has acknowledged, that "it is unlikely that there well be competition in a significant number of rural, insular, or high cost areas in the near future."[8] Even in those areas where there has been some activity, new entrants have generally focused on larger commercial customers, targeting the most immediately profitable consumer while leaving smaller businesses and residents without significant, if any, competition for their business.

Many state regulators have decided that the only way to turn this prognosis around and convince long-distance carriers to enter the rural local markets is to allow the BOCs into long-distance. For instance, the Oklahoma Corporation Commission recently told the FCC that it "believes that the best and quickest way to get [competition in the Oklahoma local market] would be for the FCC to approve" SBC's request for authority to provide long-distance service.[9] Likewise, the Public Service Commission of South Carolina concluded, in recommending that BellSouth be allowed to provide long distance for its South Carolina customers, that:

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[7] AT&T 1996 Annual Report at 3.

[8] FCC Common Carrier Bureau, Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms, at 27 (Feb. 23, 1996) ("[U]rban markets are cheaper to serve than rural markets."); Report and Order, Federal - State Joint board on Universal Service, CC Dkt. No. 96-45, at 324 (May 9, 1997).

[9] Comments of Oklahoma Corporation Commission on the Application of SBC Communications Inc., Southwestern Bell Telephone Company and Southern Bell Long Distance for the Provision of In-region InterLATA Services in Oklahoma, CC Dkt. No. 97-121, at 11 (Apr. 30, 1997).

> local competition may speed up considerably upon the lowering of the barrier to [BellSouth] competing for long distance business. Lowering this barrier will create real incentives for the major [interexchange carriers] to enter the local market rapidly in South Carolina, because they will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market. . .[10]

Again, consumers will want one-stop shopping - the ability to buy their local, long-distance, and possibly cellular service from a single provider. To compete effectively, providers will have to offer all levels of service. Thus, the best way to guarantee that rural businesses and communities will receive the benefits of local and long distance competition - lower prices, easier access, and better service - would be to eliminate the Special Provisions' punitive limitations.

C. The Special Provisions Provide An Incentive Not To Compete.

Congress intended the Telecommunications Act of 1996 to be a "pro-competitive, de-regulatory" framework for opening the telecommunications market.[11] Ironically, the Special Provisions discourage long distance companies from establishing precisely that competition at the local level. As the conclusion reached by the Public Service Commission of South Carolina discussed above suggests, those companies have a strong incentive to avoid entering local markets. If they establish local competition, they will necessarily lay the foundation for allowing the BOCs to enter into their other established markets, *e.g.*, the long distance market. So

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[10]Order Addressing Statement and Compliance with 271 of the Telecommunications Act of 1996, at 66-67 (SC PSC July 31, 1997).

[11] S. Conf. Rep. 230, 104th Cong., 2d Sess. 113 (1996).

long as these companies opt to remain relatively inactive in local markets, the Special Provisions work to make it almost impossible for any of the BOCs to demonstrate compliance with the Special Provisions' competitive checklist.

Thus, the Special Provisions promote a unique form of regulatory and litigation gamesmanship that diverts resources and attention from achieving real competition. Under Section 251 of the Act, all incumbent local exchange carriers are obligated to negotiate interconnection agreements with any other telecommunications carrier wishing access. Where agreement cannot be reached, open issues are arbitrated by the State Public Utilities Commissions. Any party may seek review of the resulting agreement in federal court. *See* 47 U.S.C. § 252.

Some major long distance carriers, like AT&T and MCI, seem to be focusing enormous energy and attention on litigation surrounding these interconnection agreements, thus artificially slowing their effective entry into these local exchange markets. Moreover, this litigation appears to be focused primarily on agreements with the BOCs. For instance, AT&T has entered into interconnection negotiations with BOCs in at least 40 States; it has sought federal court review of the resulting agreements in at least 27 of those States. Similarly, MCI has entered into interconnection negotiations with BOCs in 27 States and sought federal court review in at least 22 of those cases. By contrast, AT&T has entered into interconnection agreements with GTE in 25 States; AT&T has initiated federal court review of those agreements in only three States.

The Special Provisions make the specifically named BOCs' entry into other telecommunications markets dependent in large part upon demonstrating vigorous competition in their local exchange markets. It takes at least two to compete and, thus far, the major long distance companies have apparently determined that it is in their economic self-interest to avoid providing the BOCs any

opportunity to enter markets presently restricted by the Special Provisions. It is the Special Provisions alone that create this anti-competitive framework and its harmful consequences.

III. THE SPECIAL PROVISIONS ARE NOT NECESSARY TO PROTECT EITHER COMPETITION OR CONSUMERS.

Moreover, the Special Provisions are unnecessary. First, Sections 251 through 253 of the Telecommunications Act require all incumbent local exchange carriers to open their markets to competition. *See* 47 U.S.C. §§ 251-53. Second, Texas has well-established antitrust laws which prohibit anti-competitive conduct, and which will be agressively enforced. Most importantly, Texas has enacted detailed telecommunications legislation and regulation, designed to ensure healthy competition while requiring nondiscrimination and interconnection.

In 1995, the Texas Legislature passed the Public Utilities Regulatory Act ("PURA95"),[12] which replaced the legal certificated monopoly with open competition in the local exchange. Pursuant to PURA95, hundreds of new certificates of entry have been issued to new entrants. To promote such entry, PURA95 affirmatively required incumbents to interconnect with new entrants, *id.*, §§ 60.141, 60.125, to share their infrastructures with those entrants, *id.*, § 60.163, and to provide them with unbundled network elements, *id.*, § 60.022, and number portability, *id.*, § 60.082. To safeguard Texas consumers, PURA95 also imposed specific nondiscrimination requirements on market participants. And it established certain "competitive safeguards" to ensure "that the rates and regulations of an incumbent local exchange company are not reasonably preferential, prejudicial, or discriminatory but

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[12] TEX. REV. CIV. STAT. ANN. art. 1446c-0 (1995). PURA was amended in 1997 and can now be found at TEX. UTIL. CODE ANN. §§ 11.001-63.063 (1998).

are equitable and consistent in application." PURA95 § 60.001(a).

PURA95 thus has been carefully designed to establish, through the vigilance and expertise of the Texas Public Utilities Commission, a "balance" between "the public interest in a technologically advanced telecommunications system providing a wide range of new and innovative services [and] traditional regulatory concerns for preserving universal service, prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from regulated monopoly services." PURA95 § 3.051(g). Sections 251 and 252 of the Telecommunications Act of 1996 complement PURA95. Indeed, those provisions push the interconnection and resale obligations of incumbent carriers even further.

As long as all participants are protected by these regulatory safeguards, there is simply no need to exclude the BOCs from important and growing markets such as long distance and manufacturing. Thus, the Special Provisions are unnecessary and counterproductive. Ample statutory and regulatory safeguards exist and will be vigorously enforced in each of the States, including Texas.

CONCLUSION

For the foregoing reasons, amicus curiae, the State of Texas, requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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